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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. [redacted] 114

MAX P. LASH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on April 7, 1955.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 15, is reported in F.2d , 55-1 USTC paragraph 9344.

There is no reported opinion of the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1955. (R.A. 845; p. 25, *infra.*) A timely petition for rehearing was filed on April 22, 1955 (R.A. 845-849) and denied on May 2, 1955 (R.A. 850). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the defendant in a criminal case has an absolute right to be present at every stage of the trial as required by Rule 43 of the Federal Rules of Criminal Procedure.

2. Whether conferences in chambers and in open court between the trial judge and a juror concerning the juror's impartiality are "stage(s) of the trial" within the meaning of Rule 43 of the Federal Rules of Criminal Procedure.

3. Whether, in a prosecution for income tax evasion where the judge instructed the jury that willfulness was a necessary element of the crime but failed to define its meaning other than as synonomous with "intentionally" and "knowingly", the error was such as to warrant notice by an appellate court under Rule 52(b) of the Federal Rules of Criminal Procedure.

4. Whether, where the record on appeal discloses reversible error in the charge to the jury and such record and the defendant's brief have been printed and filed in the Court of Appeals, the trial judge has the power to order the record corrected in accordance with his "memory, notes and past experience with charges of this nature."

Statute and Rules Involved

The statute involved is Section 145 (b) of the Internal Revenue Code, 53 Stat. 62, 26 U.S.C., Section 145 (b):

> (b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Also involved are Federal Rules of Criminal Procedure, Rules 43 and 52, 18 U.S.C.A.:

> Rule 43. Presence of the Defendant.
>
> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea,

trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

Rule 52. Harmless Error and Plain Error.

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Statement

The defendant-petitioner was convicted on all three counts of an indictment alleging income tax evasion in violation of Section 145 (b) of the Internal Revenue Code, 26 U.S.C. Section 145 (b), in the United States District Court for the District of Massachusetts. The Court imposed a sentence of imprisonment on each count, the sentences to be served concurrently. (R.A. 479).

The first count of the indictment alleged that the defendant, as treasurer of a corporation named Bristol Fabrics, Inc., willfully and knowingly attempted to defeat and evade the corporation's income tax in an amount stated by filing and causing to be filed on its behalf a false and fraudulent return for its fiscal year ending November 30, 1946. The second and third counts alleged that the defendant willfully and knowingly attempted to defeat and evade his personal income taxes in stated amounts for the calendar years 1946 and 1947, respectively, by filing false and fraudulent returns for those years. (R.A. 4-6).

The government's general theory throughout the trial

was that the defendant caused Bristol Fabrics, Inc. to pay purely personal expenses of his own and of his immediate family, and later to deduct those payments as its business expenses, thereby understating the corporation's net income by the amount of those deductions, and that the payment of those expenses by Bristol constituted additional income to the defendant which he failed to report in his personal returns. (R.A. 8-9).

On appeal to the Court of Appeals for the First Circuit the defendant relied principally on the two errors here presented, namely (1) his involuntary absence during a stage of the trial and (2) the failure of the trial judge to submit the issue of willfulness to the jury under proper instructions. The Court of Appeals affirmed the judgment of the District Court on the grounds that (1) the defendant had not shown *that he was prejudiced* by his absence (2) no objection had been made to the charge on willfulness at the time of the trial and (3) the defendant's other assertions of error were too insubstantial to warrant discussion (p. 24, *infra.*)

The alleged error with respect to the defendant's absence during a stage of the trial relates to the interrogation of a juror by the trial judge in chambers and in open court with respect to the juror's impartiality. The following are the pertinent facts as set forth in the opinion of the Court of Appeals (p. 20, *infra*):

> "During a recess on the fourth morning of the trial the court was informed by one of its attaches that the wife of juror No. 2 had been seen in the corridor talking with the defendant's wife. The court called counsel on both sides into its lobby, told them of the report, and asked them if they knew anything about the incident. They expressed complete ignorance with respect to the matter and the court then sent a bailiff

to bring in juror No. 2. The juror was brought in and when asked by the court said that he knew nothing about the reported incident and added that neither he nor his wife knew either Mr. or Mrs. Lash. The court then asked what the juror's wife was doing in the courtroom and the juror replied that she had come in to see the trial and then to go out with him to lunch. The court told the juror to tell his wife not to come in again and the juror left expressing the hope that his wife had done nothing wrong."

Immediately after the recess counsel for the defendant moved for a mistrial. It was subsequently learned that the juror's wife had noticed the defendant's wife weeping in the corridor and had escorted the latter to the ladies' room, but that the two women had not discussed the case at all. At the close of the day, as the jury was leaving the courtroom, the court called juror No. 2 up to the bench and asked him if he had been frightened by being called into chambers that morning. The defendant was not present at the bench at this time. The juror replied that as a matter of fact he "may have been a little bit frightened," but that the incident would not have any effect on his ability to return a fair verdict either for the defendant or for the government. On the following day the court denied the defendant's motion for a mistrial.

As indicated above, the defendant contended that the interrogation of the juror was a "stage of the trial" within the meaning of Rule 43 of the Federal Rules of Criminal Procedure, but the Court of Appeals did not consider it necessary to decide that question in view of its holding that the error, if any, was harmless and had to be disregarded in accordance with Rule 52 (a) of the Federal Rules of Criminal Procedure.

The Court's instructions to the jury are approximately

five printed pages in length. (R.A. 468-72, 473). The following excerpts contain the entire charge on the issue of willfulness as set forth in the stenographic record of trial, together with certain other portions of the charge necessary to provide continuity:

> "As to the first count, if you are going to find the defendant guilty or not guilty on each count, you want to consider them separately. . . . (R.A. 469)
>
> "It is not important for us to sit down and try to determine how much was a proper deduction, how much was not a proper deduction, as a reduction or deduction. You have to answer the question whether he caused the corporation to evade its taxes.
>
> "*Now, the important element in this count in the indictment is, did he do it willfully? Was it some mistake, some inadvertence, something he knew nothing about or does the evidence indicate that he rather dictated it. That is for you to decide, unless you find it was done intentionally by him for any reason, unless you find it was done willfully, intentionally, you cannot convict on this count.*
>
> "*On the other hand if you find there was real evasion you can convict* . . . (R.A. 469-70).
>
> "Now, as to Count No. 2 . . . (R.A. 470).
>
> "Now, if the corporation made some improper reductions or deductions, that would affect it on Count No. 1. If the person who received those benefits reported it in his income, that would be O.K. It is his duty to so report it.
>
> "But if on the other hand he receives benefits which are for himself personally or for his family or family expenses which are not proper deductions and he did not report them, then you see he too was guilty of tax evasion because he had received his so-called con-

structive dividends and he has not paid the tax on them, *providing that you find he also did this knowingly.*

"Count No. 3 is much the same . . . (R.A. 471).

"*Bear in mind, every action chargeable to the defendant must be willful, if you think it must be something he intended to do, that is not true; this applies to every transaction, if he knew of it, there is no part of it that is not willful, if he knew of it and knew what was happening and intended it should happen.*" (Supplemental charge subsequent to bench conference, R.A. 473).

The defendant attacked the italicized portions of the charge in his brief on the grounds that they did not properly submit the issue of willfulness to the jury and were so confusing as to be completely misleading. After the defendant had filed his brief in the Court of Appeals, the government filed a motion in the District Court alleging that the stenographic record of trial prepared by the official court reporter was not an accurate record of the Court's supplemental charge to the jury. (R.A. 802-3). A hearing was held in the District Court (R.A. 808-31) at which the court reporter testified that in transcribing his notes he had added three words to the charge (R.A. 813) to make it more understandable. (R.A. 819). Aside from this, the reporter testified that the stenographic record was as nearly perfect a reproduction of what the judge had said as was possible for a court reporter to produce. (R.A. 818). Following the reporter's testimony, the Assistant U. S. Attorney's version was introduced as an exhibit. (R.A. 829, 831). At the conclusion of this hearing, five and one-half months after the trial, the judge, stating that he had "drawn on my memory, notes and past experience with

charges of this nature," ordered the record corrected to read as follows (R.A. 830-1):

> "Bear in mind that every action chargeable to the defendant must be willful, it must be something that he intended to do. It is not true that this applied to every transaction. If he did not know of it, if he was no party to it, that is not willfulness, it is only if he knew of it, knew what was happening, and intended that it should happen."

As a result of the above hearing, the Court of Appeals had before it four separate versions of the supplemental charge to the jury. The Court must have decided that none of these versions was confusing enough to warrant notice under Rule 52(b), for if it made a choice as to which was actually given to the jury, it did not so indicate in its opinion. The Court disposed of defendant's principal contention, i.e., that the trial judge had not properly *defined* the word "willfully", with the comment:

> "It is true that the court's discussion of the issue might have been more elaborate, but reading the charge as a whole against the background of the evidence and the arguments, we think the court covered the issue fully enough for the jury to understand the importance of the issue."

Reasons for Granting the Writ

1. Rule 43 of the Federal Rules of Criminal Procedure, which requires that the defendant shall be present at every stage of the trial except as otherwise provided by the Rules, embodies "a leading principle that pervades the entire law of criminal procedure." *Lewis* v. *United States*, 146 U.S.

370, 372. The ruling of the Court below is directly opposed to the holding of this Court in the *Lewis* case, upon which Rule 43 is based, and conflicts in principle with *Ah Fook Chang* v. *United States*, 91 F.2d 805. The questions presented go to the very heart of the Rule and are of primary importance in every federal criminal trial.

Rule 43, reprinted in its entirety at page 3 of this petition, states in its first sentence:

> "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules."

The Court below held that the defendant could not complain that he had been denied his fundamental rights under this Rule because he had not shown "how he was prejudiced in any way by his absence from the judge's lobby or the bench" during the interrogation of juror No. 2. Thus the Court squarely held that any and all violations of Rule 43 are "harmless error" unless actual prejudice is shown by the defendant. As far as counsel have been able to determine, no other court has taken this position since the adoption of the Federal Rules of Criminal Procedure. The principle which the Rule sets forth has always been considered so fundamental to the rights of the defendant that violations have been deemed presumptively prejudicial. In fact, the Court below previously held that Rule 43 was mandatory and did not pause to consider whether the addition of a $1.00 fine to a five-year sentence of imprisonment, which fine was immediately suspended, affected the defendant's "substantial rights." *Cook* v. *United States*, 171 F.2d 567, 569. And in *Ah Fook Chang* v. *United States*, 91 F.2d 805, decided prior to the adoption of the Rules, the

Court of Appeals for the Ninth Circuit reversed convictions for violations of the narcotic laws because the foreman of the jury came to the judge's chambers *in the presence of counsel for both sides* and requested clarification of an instruction previously given by the judge. The judge's action in instructing the juror in chambers was held to be reversable on two separate grounds, the first of which was that the defendants were entitled to be personally present at *every stage of the trial. Ah Fook Chang* v. *United States,* supra, at page 809.

It is pertinent to recall that in adopting the Federal Rules of Criminal Procedure this Court was exercising its inherent power and power conferred on it by Congress to supervise the administration of criminal justice in the Federal courts. As stated by Mr. Justice Frankfurter two years previous to the adoption of the Rules in *McNabb* v. *United States,* 318 U.S. 332, 340:

> "... while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' ... which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

In *Lewis* v. *United States,* 146 U.S. 370, this Court held

that the making of challenges was an essential part of the trial and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made. The Court stated that it was a leading principle of criminal procedure that "after indictment found, nothing shall be done in the absence of the prisoner." In *Diaz* v. *United States*, 223 U.S. 442, 445, the Court reaffirmed that in cases of felony our courts, with substantial accord, have regarded the right to be present as extending to every stage of the trial and as being scarcely less important to the accused than the right of trial itself.

The stage of a trial at which jurors are challenged is one at which the defendant must be present, as established in the *Lewis* case, *supra*. In the instant case a juror was questioned by the judge as to his fitness to continue to serve. There is no sound reason why a defendant should have any less substantial a right to be brought face to face with a juror on such an occasion than at the time when challenges are made.

Settlement of this question by this Court is plainly necessary because a requirement that the defendant show actual prejudice in order to avail himself of rights previously declared to be scarcely less important than the right of trial itself could conceivably change the entire nature of federal criminal trials. A defendant might well be required to show actual prejudice resulting from a denial of his right to confrontation or to trial by a jury of twelve. Such a construction of Rule 52(a) should not be sanctioned by this Court.

2. The decision of the Court below is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Raub*, 177 F.2d 312, and with that of the Court of Appeals for the Ninth Circuit in *Bloch* v. *United States*, F.2d , 55-1 USTC paragraph 9364,

as regards the application of Rule 52 (b) of the Federal Rules of Criminal Procedure. The Court below refused to consider alleged errors in the charge to the jury on the issue of willfulness because no objection was made at the trial. However, in the cited cases the Courts of Appeals for the Seventh and Ninth Circuits recently held that errors which are identical in principle with those alleged in the instant case were fundamental and went to the very essence of the case and had to be noticed under Rule 52 (b). The *Bloch* case, *supra*, was decided so recently that the opinion is set out in full in Appendix B hereto, *infra*, p. 26.

It must be admitted that the trial judge in the instant case used the words "willfully" and "willful" four times in his charge to the jury, but it cannot be denied that he defined "willfully", if at all, as synonymous with "intentionally" and "knowingly", *infra*, pp. 7-8. This is the very error upon which the *Raub* and *Bloch* cases were reversed, for as stated in the *Raub* case, *supra*, at p. 316, it amounts to a direction of the verdict on the issue of falsity and fraudulence. A person may intentionally fail to declare all his income or may intentionally claim unallowable deductions in the mistaken belief that such income is not taxable or that such deductions are proper. Similar instructions have also been condemned by the Court of Appeals for the Fifth Circuit in *Wardlaw* v. *United States*, 203 F.2d 884, and *Berkovitz* v. *United States*, 213 F.2d 468.

There is of course no conflict between the Courts of Appeals as regards the meaning of the word "willfully" as used in Section 145 (b) of the Internal Revenue Code, *infra*, p. 3. This Court has declared that the word often denotes an act which is intentional or knowing or voluntary, but when used in a criminal statute, it generally means an act done with a bad purpose. *United States* v. *Murdock*, 290 U.S. 389, 394. *Screws* v. *United States*, 325

U.S. 91, 101. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime and that issue must be submitted to the jury under appropriate instructions. *Screws* v. *United States*, supra, at p. 101. It is obvious, however, that a conflict exists between the Seventh and Ninth Circuits on the one hand and the Court below on the other as to whether the jury must be properly instructed as to the *meaning* of the word "willfully" or whether it is sufficient merely that the jury "understand the importance of the issue". See opinion of Court below, *infra*, p. 19.

3. This Court holds the prime responsibility for judicial supervision of the administration of criminal justice in the Federal courts. It is of prime importance that this Court preserve a defendant's rights to have his guilt or innocence found by a jury according to the procedure and standards appropriate for criminal trials in such courts. *Bollenbach* v. *United States*, 326 U.S. 607, 614. The questions raised in the instant case have far-reaching implications and, unless resolved by this Court, will result in failure to strictly observe standards previously thought to be firmly established.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 4894.

MAX P. LASH,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Joseph N. Welch, with whom *Anthony Brayton*, *John E. Laursen*, and *Hale & Dorr* were on brief, for appellant.
Charles F. Choate, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

April 7, 1955.

WOODBURY, *Circuit Judge*. A jury in the court below found the defendant-appellant guilty as charged in all three counts of an indictment alleging evasion of income taxes in violation of § 145(b) of the Internal Revenue Code, Title 26 U.S.C. § 145(b),[1] and the court imposed a sentence

[1] (b) Failure to collect and pay over tax, or attempt to defeat or evade tax.
Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or

of imprisonment on each count, the sentences to be served concurrently. On this appeal from the judgment of sentence we are concerned with assertions of error on the part of the District Court in the charge as given and in the failure to charge as requested, in rulings on the admission and exclusion of evidence, in questioning a juror in chambers in the absence of the defendant and in subsequently denying a motion for mistrial based thereon, in permitting a portion of the argument of government's counsel to stand without cautioning the jury to pay no attention to it, and in denying a motion for judgment of acquittal. Not all of the assertions of error are of sufficient substance to warrant discussion. We shall therefore state only the facts necessary for consideration of the matters which we think call for comment.

In the first count of the indictment it is alleged that the defendant, as the treasurer of a corporation named Bristol Fabrics, Inc., willfully and knowingly attempted to defeat and evade the corporation's income tax in an amount stated by filing and causing to be filed on its behalf a false and fraudulent return for its fiscal year ending November 30, 1946. In the second and third counts it is alleged that the defendant willfully and knowingly attempted to defeat and evade his personal income taxes in stated amounts for the calendar years 1946 and 1947, respectively, by filing false and fraudulent returns for those years.

The government's general theory throughout the trial and on this appeal is that the defendant caused Bristol to pay purely personal expenses of his own and of his immediate family, and later to deduct those payments as its business expenses, thereby understating the corporation's

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defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

net income by the amount of those deductions, and that the payment of those expenses by Bristol constituted additional income to the defendant which he failed to report in his personal returns.

There can be no doubt that the defendant caused some items of his and his family's purely personal expenses to be paid by Bristol and deducted by it as expenses of its business. Indeed, the defendant admits as much as to a few relatively minor items. But there is evidence from which the jury could well have found that the items so paid and deducted by Bristol were not few in number and insignificant in amount, but, on the contrary, were numerous and amounted in gross to several thousand dollars. And from this the jury would be warranted in drawing the inference urged on it by the government that the corporation did not deduct those items because of inadvertence or mistake, as the defendant contended, but that the defendant, as president, treasurer, principal managing officer, and majority stockholder of the corporation knowingly and willfully caused it to take those deductions in an attempt to defeat or evade a substantial part of its income tax for the year involved. Furthermore, there is nothing in Bristol's books to show that it was ever reimbursed by the defendant for the items of his and his family's personal expenses which it paid, or that it listed an account receivable against him in the amount of those expenses, and it appears from the defendant's tax returns that the only amount he reported as received from Bristol was his salary. From the foregoing it is clear that the court below did not err in denying the defendant's motion for judgment of acquittal on all three counts.

We therefore turn now to matters which at the most would entitle the defendant to a new trial.

The principal complaint leveled by the defendant at the charge is with respect to the instructions given to the jury

on the issue of willfulness. He says that willfulness is an essential element of the crime with which he was charged and a key issue in the case, and that the court's instructions on the issue were both unclear and inaccurate to his serious prejudice. His trial counsel, however, did not object to the portion of the charge dealing with the issue of willfulness in accordance with Rule 30 of the Federal Rules of Criminal Procedure wherein it is provided: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Nevertheless, the defendant urges that we consider his assertion of error under the established principle of appellate practice, see *Screws* v. *United States,* 325 U.S. 91, 107 (1945), embodied in Rule 52(b) of the Federal Rules of Criminal Procedure which reads: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The two Rules quoted above impinge upon one another but do not actually conflict. The Rule requiring objection to the charge before the jury retires is a salutary one in that it affords an opportunity for the prompt correction of inadvertent misstatements, oversights, omissions, or even erroneous statements of law, which if not corrected at the time would necessitate a new trial after an appeal with consequent delay and expense to the defendant and to the public. Furthermore, the Rule prevents a defendant from sitting silently by when he is aware of an error in the charge perhaps more technical than seriously prejudicial, which could and undoubtedly would be corrected on the spot if brought to the court's attention, to the end that in the event of an adverse verdict, he would have good grounds for a new trial with the chance of a favorable verdict from another jury. On the other hand, should the

Rule be rigidly applied, appellate courts would be powerless to correct grave miscarriages of justice resulting from serious errors in the charge whenever a defendant or his counsel through ignorance, inadvertence, or inexperience failed to object before the jury retired to consider its verdict. Therefore, appellate courts will take notice of errors asserted by counsel for the first time on appeal, and also notice errors *sua sponte*, when in their discretion notice of the error is necessary to prevent an injustice. The guiding principle with respect to spontaneous notice of errors, which also applies to notice of assertions of error made by counsel for the first time on appeal, was clearly and succinctly stated in *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936) as follows: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." See *Screws* v. *United States*, supra; *Yoffe* v. *United States*, 153 F.2d 570, 576 (C.A. 1, 1946) and see also *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) wherein the problem is discussed by several members of the Court although in a slightly different setting.

Under this rule we would certainly notice the omission of any reference whatever in the charge to the issue of willfulness. But that is not the situation before us, for that issue was not only stressed in the arguments of counsel on both sides but it was also discussed by the court in its charge. It is true that the court's discussion of the issue might have been more elaborate, but reading the charge as a whole against the background of the evidence and the arguments, we think the court covered the issue fully enough for the jury to understand the importance of the issue. Nor do we think that the probability of con-

fusion in the minds of the jury from what was said is great enough to warrant the inference of a serious miscarriage of justice requiring our intervention under Rule 52(b).

The alleged errors of the court in failing to charge as requested do not require extended discussion. It will suffice to say that the requested instructions, insofar as they were not given in substance, were either inaccurate or incomplete statements of law. Considering the charge as a whole we think the court gave the jury adequate guidance for its deliberations.

There are various versions of the event mentioned in the first paragraph of this opinion involving the interrogation of the juror, for it occurred in large part at times when the court reporter was not present. Briefly, however, the story which emerges from the different accounts is this: During a recess on the fourth morning of the trial the court was informed by one of its attachés that the wife of juror No. 2 had been seen in the corridor talking with the defendant's wife. The court called counsel on both sides into its lobby, told them of the report, and asked them if they knew anything about the incident. They expressed complete ignorance with respect to the matter and the court then sent a bailiff to bring in juror No. 2. The juror was brought in and when asked by the court said that he knew nothing about the reported incident and added that neither he nor his wife knew either Mr. or Mrs. Lash. The court then asked what the juror's wife was doing in the courtroom and the juror replied that she had come in to see the trial and then to go out with him to lunch. The court told the juror to tell his wife not to come in again and the juror left expressing the hope that his wife had done nothing wrong.

The court then told one of the defense counsel to ask the defendant if either he or his wife had any prior connection with either juror No. 2, or his wife, and counsel reported

back in about a minute that there was no such connection. The court said that if either party felt prejudiced by the event it would excuse juror No. 2 and proceed with eleven jurors if both parties agreed. Neither party consented to that procedure and counsel for the defendant announced that he was considering a motion for mistrial. The court indicated that it was not disposed to grant such a motion unless the government's counsel consented, and it then asked defense counsel to find out what had actually occurred between the juror's wife and the defendant's wife. The conference in chambers broke up and immediately after the recess counsel for the defendant moved for a mistrial.

Later in the day, while the motion for mistrial was still under advisement, the court called counsel to the bench for a conference, and at that time counsel for the defense told the court that the juror's wife had noticed the defendant's wife weeping in the corridor and, apparently as a gesture of sympathy, escorted the latter to the ladies' room, but that the two women had not discussed the case at all. At the close of the day, as the jury was leaving the courtroom, the court called juror No. 2 up to the bench and asked him if he had been frightened by being called into chambers that morning. According to the defendant's version only the court and the juror were at the bench at this time, although all counsel and the defendant were still in the courtroom. According to the government's version counsel on both sides were present at the bench, but the defendant himself was not. At any rate, the juror replied that as a matter of fact he "may have been a little bit frightened," and the court then asked if he was still frightened and if the occurrence of the morning would have any effect on his ability to return a fair verdict on the evidence either for the defendant or for the government. The juror answered "No, sir," and the court then said to the juror: "There is no reason why it should. Forget about the whole thing."

On the following day the court denied the defendant's motion for a mistrial.[2]

The foregoing recitation clearly discloses that this is not a case wherein the court in chambers instructed one juror on the law in the presence of counsel and directed the juror to relay the instruction to his fellows in the jury room, *Ah Fook Chang* v. *United States*, 91 F.2d 805, 808 *et seq.* (C.A. 9, 1937) or a case wherein the court without informing the defendant or his counsel placed a juror under the surveillance of an agent of the Federal Bureau of Investigation. *Remmer* v. *United States*, 347 U.S. 227 (1954). Nor is it a case involving some form of private communication, contact, or tampering with a juror during the trial which, if established in a criminal case, gives rise to a rebuttable presumption of prejudice to the defendant. *Mattox* v. *United States*, 146 U.S. 140, 148-150 (1892); *Wheaton* v. *United States*, 133 F.2d 522, 527 (C.A. 8, 1943). While at first glance the meeting of the defendant's wife and the juror's wife in the corridor may have seemed fraught with dire consequences to the fairness of the trial, particularly to the government, it turned out on only superficial investigation to be merely a tempest in a teapot. There is nothing about the incident in its entirety to compel the conclusion that it rendered the trial unfair to either side or that it operated even indirectly to the defendant's prejudice. In the absence of any clear showing of prejudice to the defendant arising from the incident, we have no occasion to disturb the District Court's ruling denying the motion for mistrial, for such motions are directed primarily to the discretion of the trial court, and that court, experiencing the event at first hand and observing the juror's character, personality, and demeanor under

[2] Counsel for the defendant say that they learned after verdict, they do not say how, that juror No. 2 told his fellows all that happened during his conversations with the court.

questioning, is in a far better position than we to determine the impact, if any, of the incident upon him.

Now, however, defense counsel assert that the defendant was prejudiced and denied his rights by the action of the court in questioning the juror and instructing him to forget about the whole thing when he, the defendant, was not personally present. We might dispose of this contention summarily on the authority of *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) wherein the Supreme Court brushed aside a like contention made for the first time on appeal with respect to the absence of the defendant by order of the court during the argument of a question of law. Some additional discussion, however, does not seem out of place.

When the court interrogated the juror in chambers in the defendant's absence but in the presence of counsel on both sides it was following a practice sanctioned by this court a generation ago in *Lewis* v. *United States*, 295 Fed. 441, 445 (1924). The defendant does not complain of that practice on constitutional grounds. Nor does he contend that he had a constitutional right to be present in person at the bench while the matters with respect to the juror were there being discussed and the juror interrogated and told to forget all about the incident. His contention is that he is entitled to a new trial because his personal absence from the judge's lobby and from the bench constituted violations of his rights under Rule 43 of the Federal Rules of Criminal Procedure which provides in its first sentence that: "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence except as otherwise provided by these rules."[3]

[3] The second sentence of the Rule reads:

"In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

The short answer to this contention is that the defendant has not shown how he was prejudiced in any way by his absence from the judge's lobby or the bench while the juror was being interviewed by the court, and the incident involving the juror's wife and defendant's wife was under discussion by the court and counsel. He was represented at the trial by experienced and competent counsel and we do not see how he could possibly have added anything of importance to what was said at either place on his behalf; we do not see how his physical presence would have been of any value whatever in discussing a matter which turned out on superficial investigation to be of no moment. Indeed, his presence might even have been prejudicial to his case for had he been present the juror might reasonably have inferred that his integrity and impartiality were groundlessly under fire from the defendant himself. Thus if there was any error in dealing with the incident involving the juror in the defendant's absence, and we do not intend to intimate that there was any, the error was harmless and must be disregarded in accordance with Rule 52(a) of the Federal Rules of Criminal Procedure which provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The defendant's assertions of error in allowing a portion of the argument of the government's counsel to stand without cautionary comment to the jury, and his assertions of error in admitting and excluding evidence have all been considered, but found too insubstantial to warrant discussion.

The judgment of the District Court is affirmed.

JUDGMENT

April 7, 1955.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

Appendix B

BERNARD BLOCH,
Appellant
v.
UNITED STATES OF AMERICA,
Appellee.

In the United States Court of Appeals for the Ninth Circuit. No. 14,266. April 11, 1955.

Appeal from the United States District Court for the District of Arizona.

Wade Church, Phoenix, Ariz., for appellant. Jack D. H. Hays, United States Attorney, Robert C. Murless, Assistant United States Attorney, Phoenix, Ariz., for appellee.

Before BONE and POPE, Circuit Judges, and MURRAY, District Judge.

MURRAY, District Judge: Appellant was charged in the District of Arizona in two counts with attempting to evade or defeat the payment of income taxes owing by him for the years 1947 and 1948, in violation of Section 145(b), Title 26, U.S.C.A.[1] After trial by a jury in the District Court, appellant was acquitted on Count One (1947 taxes) and convicted on Count Two (1948 taxes). He appeals, assigning three specifications of error.

---

[1] Sec. 145(b). Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

[*Requested Instruction*]

The first specification of error relied on is that the District Court erred in failing to give appellant's requested Instruction No. 2.[2] There is no merit in this specification of error as such. In the first place, the instruction as requested is at least misleading and confusing, if not clearly erroneous. Counsel for appellant attempted to take the instruction from the case of *Gaunt* v. *United States,* 184 Fed. (2d) 284, 291 [50-2 USTC ¶ 9412], but omitted a portion of the last sentence of the instruction on wilfulness approved in the *Gaunt* case, *supra.* In the *Gaunt* case the last sentence of the instruction read:

> "He certainly is not wilful if he acts without advice of a lawyer or accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant."

Even that language, it seems to us, may be misleading because it might be subject to the interpretation that acting without advice of a lawyer or accountant shows a complete absence of wilfulness, and such is not the law. What was meant to be said is that merely acting without advice of a lawyer or accountant does not itself prove wilfulness.

---

[2] The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145(b) of Title 26, United States Code. I instruct you that willfully "means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or to wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant."

But by omitting the explanation "for there is no requirement that the taxpayer engage a lawyer or accountant", which was contained in the *Gaunt* case, from the requested instruction in this case, the instruction became completely unacceptable, and it was not error for the trial Court to refuse it.

Furthermore, the trial Court is not obliged to give an instruction in the exact language in which it is proposed, but may choose his own language. *Wright, et al.* v. *U. S.*, 175 Fed. (2d) 384; *Nye & Nissen* v. *U. S.*, 168 Fed. (2d) 846, affirmed 336 U. S. 613; *Thayer* v. *U. S.*, 168 Fed. (2d) 247; *Petro* v. *U. S.*, 210 Fed. (2d) 49. As the Court said in *Wright, et al.* v. *U. S., supra:*

> "Fortunately, a trial judge, in formulating his charge, is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict, that is enough."

However, in examining the Court's charge to determine whether the jury was otherwise properly instructed as to the meaning of the word "willfully" as used in Section 145(b), Title 26, U.S.C.A., it becomes apparent that the charge was incorrect in several aspects, which will be hereinafter discussed.

[*Failure to Object to Erroneous Instruction*]

The appellant made no objection to the charge as given by the Court, but only objected to the failure of the Court to give his requested instruction, nor did appellant raise in this Court any question regarding the correctness of the trial Court's charge on willfulness. Whether the objection to the failure to give the offered instruction on wilful-

ness in the trial Court, and the specification of that failure as error in this Court would be a sufficient saving of the point to permit this Court to consider other nonspecified errors in the charge on wilfulness within the rule that Appellate Courts will not consider instructions to which no objections were taken at the time of trial need not be decided because of the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure and cases decided thereunder. Rule 52(b) provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Supreme Court of the United States in *U. S.* v. *Atkinson*, 297 U.S. 157, concerning this matter, said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

See also *Morris* v. *United States*, 156 Fed. (2d) 525; *U. S.* v. *Balodimas*, 177 Fed. (2d) 485 [49-2 USTC ¶ 9434]; *U. S.* v. *Perplies*, 165 Fed. (2d) 874; *Fischer* v. *U. S.*, 212 Fed. (2d) 441, 444 [54-1 USTC ¶ 9370].

The error of the trial court is, as we hereinafter point out, fundamental and goes to the very essence of the case so we must under the rule take notice of it.

Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:

> "The attempt must be willful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."

[*Presumptive Intent*]

That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. *Wardlaw* v. *U. S.*, 203 Fed. (2d) 884 [53-1 USTC ¶ 9335]. However, the trial Court went on in his instruction, and in the very next sentence said:

> "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. *Morissete* v. *U. S.*, 342 U.S. 246, 273; *Wardlaw* v. *U. S.*, *supra*. As the Supreme Court said in the *Morissette* case, *supra*, at page 275:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does

not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

The conclusion sought to be supplied by presumption in the *Morissette* case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.

[*Erroneous Instruction on Willfulness*]

The trial Court further instructed the jury as follows:

"Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*

"*Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act.*" (Italics supplied)

We think that the italicized portion of the above instruction is erroneous in this case.

This portion of the Court's charge apparently was taken from the language of the Supreme Court in *U. S.* v. *Murdock,* 290 U. S. 389 [3 USTC ¶ 1194] at 394. The *Murdock* case was one in which defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928 which sections were identical. Those sections provided that:

> "any person * * * required by law or regulations * * * to supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to * * * supply such information * * * shall * * * be guilty of a misdemeanor * * *."

When the Supreme Court there used the language which is embodied in the quoted portion of the trial Court's charge in this case, it was talking about how the word "wilfully" is variously defined under different statutes and circumstances. It is significant that in that case the Supreme Court, addressing itself to the particular case before it, said:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an element of the offense."

The *Murdock* case itself does not apply the definition of

"wilfully" used by the trial Court in the instant Section 145(b) case.

In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section. See *Hargrove* v. *U. S.*, 67 Fed. (2d) 820, 823 [3 USTC ¶ 1192], wherein the Court discussed and distinguished the element of intent necessary under different statutes. See also *U. S.* v. *Martell*, 199 Fed. (2d) 670 [52-2 USTC ¶ 9541].

These errors in the instruction are plain and affect substantial rights of the defendant and the fairness of the trial and require a reversal of the case.

[*Prejudicial Examination*]

Appellant's second specification of error is that the Court erred in failing to properly instruct the jury with reference to certain questions asked by the prosecution. Appellant was asked questions as to whether he had ever sworn that he had not had sexual relations with named women, whether he had ever taken oath that he had not performed illegal operations, whether he had been refused a doctor's license and whether he had kept a mistress. Objections to these questions were made and properly sustained by the Judge who in this regard did everything requested of him by counsel for the defendant. The Judge would no doubt have given a more specific and detailed instruction advising the

jury to disregard those questions and the implications arising therefrom had he been so requested.

Whether the instructions the Court did give in this connection were sufficient to protect the defendant need not now be decided inasmuch as the case must be reversed for the reasons already stated.

It is, however, appropriate to express our disapproval of the tactics employed by the government attorney in the prosecution of this case. The government on appeal sought to justify these prejudicial questions on the ground that the appellant had put his character in issue when he testified he was a member of the Junior Chamber of Commerce and that he had opened a skating rink to help deal with the problem of juvenile delinquency. We cannot agree that this testimony put appellant's character in issue. Furthermore, some of the questions concerning the appellant keeping a mistress were asked of witnesses before appellant ever took the stand.

The appellant was on trial on the charge of attempting to evade or defeat the payment of his income tax. His guilt or innocence of that charge was the only issue in the case and the questions asked, above referred to, were not relevant in any way to that issue and could only serve to paint the appellant as a scoundrel in the eyes of the jury. The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being an all round, no good dissolute person, is foreign to our system and is disapproved by this Court.

Appellant's third specification of error is that the jury brought in conflicting verdicts on counts one and two. There is no merit in this specification.

The cause is reversed and remanded for a new trial on Count two of the indictment.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 114

MAX P. LASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15-24) is reported at 221 F. 2d 237.

JURISDICTION

The judgment of the Court of Appeals (Pet. 25; R. 845) [1] was entered on April 7, 1955. A petition for rehearing was filed on April 22, 1955 (R. 845-849) and denied on May 2, 1955 (R. 850). The pe-

[1] Record references are made to the appendices to the briefs in the court below and to the record of proceedings before that court.

tition for certiorari was filed on May 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's absence from conferences held by the trial judge on an issue collateral to his trial constitutes prejudicial error.

2. Whether the trial court's instructions on the element of wilfulness, to which no objection was made, constitute plain error.

STATUTE AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 43. PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corpo-

ration may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On February 13, 1953, petitioner was indicted in the United States District Court for the District of Massachusetts on three counts of wilful attempt to evade income taxes by filing and causing to be filed fraudulent returns in violation of Section 145(b) of the Internal Revenue Code of 1939. As treasurer of Bristol Fabrics, Inc., petitioner was charged in the first count with wilful attempt to evade the corporation's income tax for the fiscal year ended November 30, 1946. The remaining two counts charged him with wilful attempt to evade his income taxes for the calendar years 1946 and 1947. The amounts of income and the taxes due

thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 4-6):

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (corporation) (1946)....	$76,018.68	$30,749.71	$87,567.22	$35,851.50
Count II (individual) (1946).....	29,031.36	11,104.97	42,665.15	19,516.75
Count III (individual) (1947)....	37,210.28	14,855.87	42,705.74	17,511.40

After a jury trial lasting seven days, petitioner was found guilty as charged (R. 473), and on June 2, 1954, he was sentenced to imprisonment for a period of six months on each count, all terms of imprisonment to run concurrently (R. 479). The Court of Appeals affirmed (Pet. 15-25).

The evidence to support the verdict may be summarized as follows:

For the period here involved, petitioner was president, treasurer, and majority stockholder of Bristol Fabrics, Inc., a corporation which employed six or seven persons. He, his wife and his daughter owned all of the corporate stock. (R. 126, 140, 219, 567.) All company checks were signed by petitioner. (R. 147, 153, 192.) By specific items of proof it was established that Bristol Fabrics, Inc. paid numerous invoices for personal expenses incurred by petitioner and his wife. For the fiscal year ended November 30, 1946, these included household utilities (R. 65-68, 108-113, 271), house furnishings (R. 54-55, 77-80, 85-87, 90-93, 106-108), ladies' apparel (R. 34-37, 42-46, 73-74, 76-77, 87-90), and a seven weeks' stay in Florida at The Boca Raton Club (R. 219, 567-601). Similar ex-

penditures were shown for the year 1947. These payments were deducted as business expenses, thereby understating the corporation's net income. (R. 265-267, 647-669.) Petitioner failed to report the additional income in his personal returns (R. 543-565.)

Petitioner discussed tax matters with his accountant, who advised him that personal expenses were non-deductible and that perhaps one-half of his Florida expenses could be deducted as business items. When the accountant questioned the subsequent 100% deduction of the Boca Raton expenses, petitioner said "he devoted his time to business." (R. 123-124, 133, 169.) The evidence established that the Bristol Fabrics, Inc. sales and office activities were in other hands at the time. (R. 229, 693 *et seq.*)

On the fourth day of the trial a conference in the court's lobby was held in the defendant's absence, but in the presence of counsel, concerning an incident occurring during the trial. A juror's wife had been seen talking to petitioner's wife. On interrogation by the court the juror stated that neither he nor his wife knew the petitioner or his wife. The juror's wife was in court to see the trial and to go to lunch with him. It later appeared that she had attempted to comfort the petitioner's wife who had appeared disturbed. After the questioning in the lobby petitioner's counsel moved for a mistrial. The court determined that the incident was harmless and the motion was denied. At the close of the day the court spoke to the juror in

question at the bench to inquire whether he could disregard the inquiries and give a fair verdict. There is dispute as to whether counsel were present throughout this conversation although both were admittedly in attendance at its conclusion. Petitioner made no point of his absence from the conversations until the case was on appeal. (R. 243-244, 481-494.)

ARGUMENT

1. Petitioner contends (Pet. 9-12) that Rule 43 of the Federal Rules of Criminal Procedure, *supra*, pp. 3-4, confers on a defendant the right to be present at all stages of a trial and that this rule was violated by his not being in attendance when the juror was questioned by the court.

Without doubt the right of a defendant to be present during the essential parts of his own trial is a necessary element of a fair trial, and is required by due process and the Sixth Amendment. *Snyder* v. *Massachusetts*, 291 U. S. 97; *United States* v. *Hayman*, 342 U. S. 205. Rule 43 of Federal Rules of Criminal Procedure, as the Advisory Committee's notes indicate, was intended merely to codify the existing law with reference to this right. Specifically it recognizes that voluntary absence waives the right. Cf. *Diaz* v. *United States*, 223 U. S. 442.

In the present case it is not argued that the petitioner was absent from the trial during any of its essential parts. Thus it differs from *Lewis* v. *United States*, 146 U. S. 370, where the defendant was absent during the selection of the jury. Here,

instead, the defendant was absent only during a collateral proceeding, where he was represented by counsel, and during a brief conversation at the bench, where, admittedly, counsel were present during the concluding remarks and could have taken any steps deemed advisable to protect his interests. This situation is analogous to the necessity of the defendant's being present during the argument of motions, where it has been held that presence is not necessary. *United States* v. *Lynch,* 132 F. 2d 111 (C.A. 3). That case has been recognized as expressing the law by the Advisory Committee in its notes to Rule 43. Compare also *Johnson* v. *United States,* 318 U. S. 189, 201, in which the absence of the defendant during the course of argument at the bench was held not a basis for reversal, and *United States* v. *Hayman,* 342 U. S. 205, where, on the disposition of a motion to set aside a sentence under 28 U.S.C. 2255, the Court stated (at p. 223) that the defendant should have been present in the circumstances of that case, but suggested that that was so only because "there were substantial issues of fact as to events in which the prisoner participated." Here, the petitioner had no knowledge of the events involved and was not present when they occurred.

Moreover, petitioner's counsel was present throughout the conference in the court lobby and, at least, at the conclusion of the bench conversation. He made no request that the petitioner be permitted to attend and offered no objection that the bench conversation was commenced in his absence.

Certainly there was opportunity to correct any prejudice by prompt complaint. Instead the motion for mistrial was based solely on the questioning of the juror, an issue which is not even raised before this Court. It appears that even had the petitioner's rights been infringed, the error was waived. *Diaz* v. *United States,* 223 U. S. 442. And, as the court below pointed out, no prejudice to the petitioner resulted (Pet. 24).

In short, the issue of the petitioner's absence from conferences appears to be an afterthought, a quest for error on which to predicate a plea for a new trial, rather than an attempt to correct an injustice which impaired his right to a fair trial. Cf. *Johnson* v. *United States,* 318 U.S. 189.

2. Petitioner contends (Pet. 12-14) that the trial court committed error in the instructions on wilfulness. Here again petitioner made no objection at the time of trial. It appears that petitioner's trial counsel was either satisfied with the instructions given or that he was seeking to lay a technical basis for the granting of a new trial. He had requested 33 instructions to the jury, two of which (Nos. 4 and 5) were on the subject of wilfulness. (R. 798-802.) Although he objected to the court's failure to give 29 out of the 33 requests, he did not object to the omission of the two requests concerning wilfulness. (R. 473.)

Since petitioner failed to object before the jury retired to consider its verdict, he may not now assign as error that portion of the charge on the element of wilfulness or any omission therefrom.

Rule 30, *supra*, p. 3. As the Court of Appeals for the Seventh Circuit said in *United States* v. *Furlong*, 194 F. 2d 1, 3, certiorari denied, 343 U.S. 950:

> [Rule 30] is intended to prevent a litigant from taking advantage, after verdict, of the giving of an erroneous instruction to which he failed to call attention in time to afford the court an opportunity to correct it.

In construing the same rule the court below in this case noted (Pet. 18):

> the Rule prevents a defendant from sitting silently by when he is aware of an error in the charge perhaps more technical than seriously prejudicial, which could and undoubtedly would be corrected on the spot if brought to the court's attention, to the end that in the event of an adverse verdict, he would have good grounds for a new trial with the chance of a favorable verdict from another jury. * * *

With full recognition of its prerogative to notice plain error, the Court of Appeals reviewed the instructions in light of the evidence and the arguments and said (Pet. 19-20):

> Under this rule we would certainly notice the omission of any reference whatever in the charge to the issue of willfulness. But that is not the situation before us, for that issue was not only stressed in the arguments of counsel on both sides but it was also discussed

> by the court in its charge. It is true that the court's discussion of the issue might have been more elaborate, but reading the charge as a whole against the background of the evidence and the arguments, we think the court covered the issue fully enough for the jury to understand the importance of the issue. Nor do we think that the probability of confusion in the minds of the jury from what was said is great enough to warrant the inference of a serious miscarriage of justice requiring our intervention under Rule 52 (b).

A conflict is said to exist (Pet. 12-13) between this case and *United States* v. *Raub,* 177 F. 2d 312 (C.A. 7th); *Bloch* v. *United States,* 221 F. 2d 786 (C.A. 9th), (Pet. 26-34); *Wardlaw* v. *United States,* 203 F. 2d 884 (C.A. 5th), and *Berkovitz* v. *United States,* 213 F. 2d 468 (C.A. 5th), where the courts reversed for instructions on wilfulness even though no objection had been made at trial. But, as demonstrated by the last paragraph, in this case the court below indicated that it too would have noted the error if it found it material (Pet. 19).

Petitioner cites (Pet. 13-14) *United States* v. *Murdock,* 290 U.S. 389, 394, and *Screws* v. *United States,* 325 U.S. 91, 101, in support of the argument that the jury should have been instructed that wilfulness denotes an act done with an "evil motive" or "bad purpose". While the charge does not contain this language, it clearly distin-

guishes the case where a taxpayer inadvertently, innocently or mistakenly fails to report his income correctly. Charges on wilfulness using similar language were approved in *Stinnett* v. *United States*, 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U.S. 957, and *United States* v. *Schenck*, 126 F. 2d 702 (C.A. 2d), certiorari denied, *sub nom. Moskowitz* v. *United States*, 316 U.S. 705.[2]

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[2] Although petitioner has not argued the point, by his statement of the questions presented he has implied (Pet. 2) that the trial judge has no power to order the record corrected after the record and defendant's brief have been printed. This argument runs directly contrary to the wording in Rule 75 (h), Federal Rules of Civil Procedure, as made applicable by Rule 39 (b) (1), Federal Rules of Criminal Procedure. Rule 75 (h) provides in part—

> if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, *or the district court, either before or after the record is transmitted to the appellate court*, or the appellate court, on a proper suggestion or of its own initiative, *may direct that the omission or misstatement shall be corrected*, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. [Emphasis supplied.]

The finding of the trial judge is conclusive "as to whether the record truly discloses what occurred in the district court * * *." *Belt* v. *Holton*, 197 F. 2d 579, 581 (C.A. D.C.)

CONCLUSION

The decision of the court below is clearly correct and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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